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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Supreme Court Copy

In re NATHAN POPE, Petitioner-Appellee, vs. On Habeas Corpus	NO._____ 3 Crim. C051564 Sacramento County No. 05F05526

PETITION FOR REVIEW

CENTRAL CALIFORNIA
APPELLATE PROGRAM

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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	)	NO._____
NATHAN POPE,	)	
	)	3 Crim. C051564
Petitioner-Appellee,	)	
	)	Sacramento County
vs.	)	No. 05F05526
	)	
On Habeas Corpus	)	

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant respectfully petitions this court for review following the decision of the Court of Appeal, Third Appellate District, filed on January 8, 2008. A copy of the opinion of the Court of Appeal is attached as exhibit A.

ISSUE PRESENTED FOR REVIEW

Does the conduct credit limitation of Penal Code section 2933.1 apply when Penal Code section 654 was applied to the only count that was considered a violent felony?

NECESSITY FOR REVIEW

A grant of review and resolution of the issue is necessary to settle this important question of law because the Third District Court of Appeal's published ruling is in direct conflict with the First Appellate District , Division 2, published opinion, *In re Phelon* (2005) 132 Cal.App.4th 1214.

In *People v. Duff*, S153917, this Court granted review August 29, 2007, on a related issue-namely, "Does Penal Code section 2933.2, which provides that 'any person who is convicted of murder . . . shall not accrue any credit, as specified in [Penal Code]

section 2933,' apply where the defendant was convicted of murder but the sentence was stayed under Penal Code section 654?"

STATEMENT OF THE CASE

On March 28, 2003, respondent Nathan Joel Pope was sentenced to state prison for six years for violation of Penal Code[1] section 191.5, subdivision (a) (gross vehicular manslaughter). He was also sentenced to prison terms for violations of Vehicle Code sections 23153, subdivision (a) (driving under the influence of alcohol with injury) with an enhancement pursuant to section 12022.7, subdivision (a) (personal infliction of great bodily injury) and 23153, subdivision (b) (driving with a blood alcohol level in excess of .08% with injury) with an enhancement pursuant to section 12022.7, subdivision (a). However, the trial court determined that Penal Code section 654 applied and multiple punishment was prohibited. The court imposed sentence for the count that carried "...the longest potential term of imprisonment ...," which was the gross vehicular manslaughter, in accord with section 654. Following the procedure first approved and discussed in *People v. Niles* (1964) 227 Cal.App.2d 749, the court also imposed sentence on the remaining two counts, and stayed the order for that punishment. (CT 16-17.)

Following respondent's commitment to the Department of Corrections for the six-year prison term, the Department calculated his potential release date based on the earning of credits pursuant to section 2933.1 (15 % worktime limitation for violent felony). (CT 7-11.)

Respondent then filed a petition for writ of habeas corpus in the superior court and on October 21, 2005, the petition was granted with the Department ordered to recalculate credits pursuant to section 2933. (CT 1-7, 67-69.)

The prosecution appealed from the order and on January 8, 2008, the appellate court vacated the superior court order, directing it to enter an order denying the habeas petition. (Slip opn. p. 10.)

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[1] All further undesignated code sections are to the Penal Code.

STATEMENT OF THE FACTS

On January 29, 2002, during early morning, respondent, driving his vehicle at a high rate of speed, entered an intersection and collided with a second vehicle. The driver of the second vehicle died when the fuel tank of his vehicle ruptured and exploded. Results of a subsequent blood sample taken from Mr. Pope revealed a .25% blood alcohol level and the presence of benzoylegonine, a breakdown of cocaine within the body. (CT 47.)

ARGUMENT

Respondent was convicted by plea of both a non violent felony and two violent felonies. The sentences for the violent felonies were stayed pursuant to the procedure approved in *People v. Niles, supra*, 227 Cal.App.2d 749, at 756, when section 654 applies, and a six-year prison sentence was imposed for the nonviolent felony. The California Department of Corrections and Rehabilitation (CDCR) calculated conduct credits on this nonviolent term at 15% pursuant to section 2933.1, subdivision (a), which limits the accrual of worktime credits to 15% for any person convicted of a violent felony. As discussed below, limits on credit-earning constitute punishment. Because the language of section 2933.1 does not create a specific statutory authorization for an exception to section 654, section 2933.1 is insufficient to override section 654's prohibition against multiple punishment. Since the sentence that respondent was actually serving is not one that qualified as a violent offense under section 2933.1, it is not subject to the 2933.1 conduct credit limitation and CDCR's conduct credit calculation pursuant to section 2933.1 resulted in the multiple punishment barred by section 654.

The issue presented in this case is whether section 2933.1 sets forth an exception to Penal Code section 654. Prior to the instant case, *In re Phelon* (2005) 132 Cal.App.4th 1214, 1221 considered this very issue. The First District held that, under *People v. Reeves* (2005) 35 Cal.4th 765, section 2933.1 applied only to the sentence that petitioner was actually serving. Since the punishment for Phelon's violent felonies was stayed because section 654 applied, Phelon was not serving a sentence for a violent felony. Thus, section 2933.1 did not apply.

The Third District rejected *Phelon's* reliance on *Reeves*, stating that *Reeves* was not dispositive, as it, "did not involve a sentence stayed pursuant to section 654 and section 654 is never mentioned in *Reeves*." As will be discussed, this conclusion is flawed because *Reeves'* analysis applies exactly to the 654 issue presented here, regardless whether *Reeves* specifically mentioned 654.

Petitioner Reeves was serving concurrent sentences for a violent felony and a nonviolent felony with the violent felony term being the shorter of the two. The Department of Corrections applied the 2933.1 limit to the entire sentence. Penal Code section 2933.1, subdivision (a) provides in relevant part, "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933." The Supreme Court acknowledged that section 2933.1 was ambiguously worded but ultimately determined that, " Section 2933.1(a) limits to 15 percent the rate at which a prisoner convicted of *and serving time for* a violent offense may earn worktime credit, regardless of any other offenses for which such a prisoner is simultaneously serving a sentence. On the other hand, section 2933.1(a) has no application to a prisoner who is *not actually serving a sentence for* a violent offense; such a prisoner may earn credit at a rate unaffected by the section. " (*In re Reeves*, *supra,* 780 [Italics added.) Thus, the determining factor is whether the prisoner is actually serving a sentence for the qualifying felony. If the Department has no claim to the prisoner's physical custody, 2933.1 does not come into play. (*In re Reeves, supra*, 777.)

Reeves was followed by *In re Tate* (2006) 135 Cal. App. 4th 756. During Tate's incarceration for a violent felony, he was convicted of a nonviolent in-prison offense and sentenced to a fully consecutive two-year term. Because the four-year six-month term was for a violent felony, the Department applied the limitation in Pen. Code, sec. 2933.1, on credits to the terms on both convictions. The trial court rejected the Department's interpretation, reasoning that, "The credit limitation of 15% argued by the Department of Corrections is not supported by the plain language of Penal Code § 2933.1. That statutory language limits the 15% worktime credits to the sentence imposed on the conviction of the violent felony. The statute does not address limitations on worktime credits for those persons who have previously been convicted of a violent felony, but who are now convicted of a nonviolent offense that was separately charged and proved." (*Id.* p. 760.)

The Fifth District held that the trial court's order was correct to the extent it ordered the Department to apply Penal Code section 2933, to the inmate's in-prison conviction. The inmate's consecutive sentence for his nonviolent in-prison offense was not merged or aggregated with his original term for the violent out-of-prison offense. Instead, the two terms were treated as separate terms, with the term for the in-prison offense beginning only when the inmate completed the term for his out-of-prison offense. Although Penal Code section 2933.1, subd. (a), applied to a prisoner's entire sentence, it only did so to the extent the prisoner was serving time for a violent offense.

Penal Code section 654 provides that, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." To achieve section 654's intent of prohibiting multiple punishment, courts have fashioned a device of pronouncing but staying the sentence for the count that is subject to 654 because it affords the defendant "the maximum protection to which section 654 entitles him and, under no condition, can operate to his prejudice." (*People v. Niles, supra*, 227 Cal.App.2d 749, 756.) In *Niles*, the superior court imposed a prison term for a count that was subject to section 654. The trial judge then stayed the sentence on that count. The defendant challenged that procedure as amounting to proscribed double punishment. The Court of Appeal concluded that it did NOT constitute punishment at all, so it did not violate section 654. It would only become punishment if the conviction on the other count was reversed.

The "stay" procedure resolved the problem of what happens if the count on which sentence is carried out is later reversed. But it is not expressly a component of section 654, which simply proscribes multiple punishment. *Niles* concluded that *People v. McFarland* (1962) 58 Ca.3d 748 stood for the proposition that the problem is not resolved by imposition of concurrent sentences. *McFarland* vacated the concurrent sentence that had been imposed on a count that was subject to section 654. "Section 654 therefore

prohibits *punishment* for a stayed offense." (*People v. Avila* (1982) 138 Cal.App.3d 873, 879.) Thus, if the sentence on that conviction is stayed and defendant is not serving the sentence, section 654 prohibits the use of the conviction for any punitive purpose and prohibits a "defendant from being disadvantaged in any way as a result of the stayed convictions." (*In re Phelon, supra,* (2005) 132 Cal. App. 4th 1214, 1220; *People v. Pearson* (1986) 42 Cal.3d 351, 361; see also *People v. Bracamonte* (2003) 106 Cal.App.4th 704 [where base term stayed, enhancement must be stayed]; *People v. Guilford* (1984) 151 Cal.App.3d 406, 411 [same]; *People v. Percelle* (2005) 126 Cal.App.4th 164 [no prior prison term enhancement can be imposed for an offense for which the prior term was stayed under section 654]; *People v. Avila, supra,* 138 Cal.App.3d 873, 878-879 [while a kidnapping conviction normally precludes a CYA commitment, such is not the case when the conviction is stayed, for that would constitute the imposition of forbidden punishment contrary to section 654].)

Punishment includes limits on conduct credit-earning. For example, retroactive retraction of previously-available sentence credits constitutes punishment in violation of the prohibition on ex post facto laws. (*In re Lomax* (1998) 66 Cal.App.4th 639; *In re Winner* (1996) 56 Cal.App.4th 1481; *Lynce v. Mathis* (1997) 519 U.S. 433; *Flemming v. Oregon Board of Parole* (9th Cir. 1993) 998 F.2d 721; see also *People v. Palacios* (1997) 56 Cal.App.4th 252 [applying ex post facto analysis to 2933.1 issue]. The limit on conduct credit-earning as contained in section 2933.1 is a form of punishment.

As discussed, *Reeves* held that unless a defendant is actually serving the sentence for a violent felony, he is not subject to 2933.1. When a sentence is stayed pursuant to section 654, defendant is not serving the sentence and is not subject to the conduct credit limitation. To permit the limitation of 2933.1 against a nonviolent felony prison term, as countenanced by the appellate court, is contrary to the meaning of 2933.1 as interpreted by *Reeves*, and violates section 654.

The appellate court attempted to reconcile its opinion by rejecting *Reeves* and, instead, finding support in *People v. Benson* (1998) 18 Cal.4th 24. (Slip opn. P. 7.) Yet the Third District's reliance on *Benson* is exactly the type of faulty reliance the appellate court complained that the *Phelon* court had committed. *Benson* considered the interplay between the 3-strikes sentencing scheme, not a conduct time-credit scheme and, as such, is not applicable to the issue raised in appellant's case. Parenthetically, even if *Benson* was useful by analogy, the appellate court seems not to recognize the importance of section 1170.12, subdivision (b), which would appear to explicitly include a sentence stayed by 654. The appellate court in this case focused on the introductory phrase of section 2933.1, "Notwithstanding any other law," to find that with these words the Legislature explicitly declared an exception to the protection of section 654. But, as even the opinion itself states, "*Benson* concluded that section 1170.12, subdivision (b)'s 'notwithstanding ' language, coupled with language that a 'stay of execution of sentence' shall not affect a conviction's status as a prior felony, rendered section 1170.12, subdivision (d) clear and unambiguous and meant that a prior serious or violent felony conviction for which sentence had been stayed under section 654 was still available for purposes of the three strikes law. (*Benson*, at p. 36.)." What defeats the analogy is that, unlike the explicit declaration of section 1170.12, subdivision (b), section 2933.1 contains no such declaration. Contrary to the appellate court's finding, section 2933.1 does not explicitly except section 654. The Legislature has demonstrated that it knows how to be explicit, as it was in section 1170.12. As noted in *Reeves*, if the Legislature intended it to do so, it is "free to amend the section if and as it chooses." (*People v. Reeves, supra*, 35 Cal.4th 765, 781.)

In sum, because respondent was not serving a term for a violent felony, accrual of postsentence conduct credits are not governed by section 2933.1.

CONCLUSION

Appellant respectfully requests, for the reasons stated above, that this petition for review be granted.

Dated: February 14, 2008

Respectfully Submitted,

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Certificate of Appellate Counsel
Pursuant to rule 28.1(e)(1) of the California Rules of Court

I, Deborah Prucha, appointed counsel for appellant, certify pursuant to rule 28.1(e)(1) of the California Rules of Court, that I prepared this petition for review on behalf of my client, and that the word count for this petition is **2581.**

This petition complies with the rule that limits a petition for review to 8,400 in WordPerfect 9. I certify that I prepared this document in WordPerfect 9 and that this is the word count WordPerfect generated for this document.

Dated: February 14, 2008

_____
Deborah Prucha
Attorney for Appellant/Petitioner

EXHIBIT "A"

CERTIFIED FOR PUBLICATION

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re NATHAN POPE,	C051564
On Habeas Corpus.	(Super. Ct. No. 05F05526)

APPEAL from the grant of a petition for writ of habeas corpus by the Superior Court of Sacramento County, Greta Fall, J. Reversed with directions.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, James M. Humes and Robert R. Anderson, Chief Assistant Attorneys General, Frances T. Grunder and Julie L. Garland, Senior Assistant Attorneys General, Stephen P. Acquisto and Jennifer A. Neill, Supervising Deputy Attorneys General, and Krista L. Pollard, Deputy Attorney General, for Petitioner the People.

Deborah Prucha, under appointment by the Court of Appeal, for Respondent Nathan Pope.

The People appeal from an order of the Sacramento County Superior Court granting defendant Nathan Pope's petition for writ of habeas corpus directing the California Department of Corrections and Rehabilitation (CDCR) to recalculate his Penal

Code section 2933[1] worktime credit without regard to the 15 percent limitation on such credit provided by section 2933.1, subdivision (a) (hereafter section 2933.1(a)) for persons convicted of a violent felony.[2] The superior court's ruling was based on a decision of the Court of Appeal, First Appellate District, Division Two. (*In re Phelon* (2005) 132 Cal.App.4th 1214 (*Phelon*).) The superior court was required to follow *Phelon*. We are not so restrained. In our view, *Phelon* was wrongly decided. Concluding that section 2933.1(a) is applicable to defendant, we shall direct the superior court to vacate its order denying the petition.

PROCEDURAL HISTORY AND FACTS

In January 2002, while driving under the influence of alcohol and cocaine, defendant struck another vehicle, causing the death of the driver. Defendant pled guilty to gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)), which is not a violent felony, and to two felony counts of alcohol-related driving with admissions as to each of great bodily injury (Veh. Code, § 23153, subds. (a), (b); Pen. Code, § 12022.7, subd. (a)), each of which is a violent felony (Pen. Code, § 667.5, subd. (c)(8) [any felony in which the

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Violent felonies are crimes specified in section 667.5, subdivision (c).

defendant inflicts great bodily injury in violation of § 12022.7]).

Defendant was sentenced to state prison for the middle term of six years for the gross vehicular manslaughter conviction and to five years for each of the alcohol-related driving offenses (two-year middle term plus three years for the associated enhancement). However, the latter two sentences were stayed pursuant to section 654, which prohibits multiple punishments for a single act.[3]

Once defendant was delivered to CDCR, the latter determined that because defendant had been convicted of two violent felonies he was subject to section 2933.1(a)'s limitation of 15 percent for worktime credit earned pursuant to section 2933,[4] notwithstanding defendant's argument that section 2933.1(a) was

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[3] Penal Code section 654 provides, in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Since gross vehicular manslaughter carries a maximum term of 10 years (Pen. Code, § 191.5, subd. (c)) and each of the alcohol-related driving offenses coupled with the great bodily injury enhancement carries a maximum term of six years (Veh. Code, § 23558; Pen. Code, § 12022.7, subd. (a)), the court was required to impose sentence on the vehicular manslaughter offense and to stay the sentences on the alcohol-related offenses.

[4] Section 2933.1 provides, in pertinent part: "Notwithstanding any other law, any person who is *convicted* of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933." (Italics added.)

not applicable to him because the sentences for those offenses had been stayed. In June 2005, after exhausting his administrative remedies, defendant renewed his argument in the Sacramento County Superior Court by filing a habeas corpus petition.

In September 2005, while defendant's habeas corpus petition was pending, the Court of Appeal, First Appellate District, filed its opinion in *Phelon*, *supra*, 132 Cal.App.4th 1214, which supported defendant's position. In October 2005, in reliance on *Phelon*, the superior court granted defendant's petition and ordered CDCR to recalculate defendant's section 2933 credit free of section 2933.1(a)'s 15 percent limitation on such credit.

The People argue that *Phelon* was incorrectly decided because it failed to recognize that section 2933.1(a) constitutes a legislatively enacted exception to section 654. Thus, defendant is not entitled to section 2933 credit. We agree with the People's position.

DISCUSSION

Insofar as is relevant to the analysis herein, the facts of *Phelon* are as follows: The defendant was convicted of kidnapping with intent to commit rape, which was not a violent offense, and with assault with intent to commit rape and assault by means of force likely to produce great bodily injury, which are violent offenses. (*Phelon*, *supra*, 132 Cal.App.4th at p. 1216.) Because the kidnapping conviction carried the longest term of potential imprisonment, the trial court sentenced the defendant to an unstayed term of 11 years for that offense, and

stayed the sentences imposed on the other counts pursuant to section 654. (*Phelon*, at p. 1216.) The trial court also awarded the defendant full section 4019 presentence custody credit.[5] (*Phelon*, at p. 1217.)

CDCR took the position that since the defendant had been convicted of violent felonies, his ability to earn section 2933 credit was limited by section 2933.1(a)'s 15 percent limitation. (*Phelon*, *supra*, 132 Cal.App.4th at p. 1217.)

The defendant sought habeas corpus relief and the matter made its way to the California Supreme Court. Although the defendant had challenged only CDCR's ruling regarding postsentence credit, the California Supreme Court issued an order to show cause, returnable before the Court of Appeal, as to "'(1) why petitioner's presentence credits should not exceed 15 percent of his actual period of confinement, pursuant to Penal Code, section[] 2933.1, subdivisions (a) and (c) (see *People v. Ramos* (1996) 50 Cal.App.4th 810, 817, 58 Cal.Rptr.2d 24 [(*Ramos*)]; and (2) why petitioner's postsentence credits should not be limited to 15 percent by Penal Code section 2933.1, subdivision (a), when his sentences on violent offenses listed in Penal Code section 667.5, subdivision (c) were stayed pursuant to Penal Code section 654.'" (*Phelon*, *supra*, 132 Cal.App.4th at p. 1217.)

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[5] Section 2933.1, subd. (c) applies a 15 percent limitation to presentence credit awarded pursuant to section 4019.

As to postsentence credit, the parties in *Phelon* conceded that *In re Reeves* (2005) 35 Cal.4th 765 (*Reeves*) was "determinative" of that issue. (*Phelon*, *supra*, 132 Cal.App.4th at p. 1218.) The court's acceptance of the concession was a mistake.

Reeves had concluded that where an inmate is serving concurrent sentences for a violent and a nonviolent crime, and the inmate completes his sentence for the violent crime before completing the sentence for the nonviolent crime, the inmate is no longer subject to section 2933.1(a)'s 15 percent limitation. (*Reeves*, *supra*, 35 Cal.4th at p. 769.) In drawing this conclusion, *Reeves* stated: "*[S]ection 2933.1(a) has no application to a prisoner who is not actually serving a sentence for a violent offense; such a prisoner may earn credit at a rate unaffected by the section.*" (*Reeves*, at p. 780, fn. omitted, italics added.)

Seizing upon the italicized language, *Phelon* concluded that "[u]nder *Reeves*, [defendant Phelon's] postsentence credits should not be limited by section 2933.1(a) because his sentences on the qualifying violent offenses were stayed pursuant to section 654." (*Phelon*, *supra*, 132 Cal.App.4th at p. 1219.) In other words, where a sentence is stayed under section 654, the defendant "is not actually serving a sentence" for that conviction. Later, in addressing section 2933.1, subdivision (c)'s application to the defendant's presentence custody credit, *Phelon* gave additional support for its conclusion regarding postsentence credit when it observed that

the California Supreme Court had held in *People v. Pearson* (1986) 42 Cal.3d 351 (*Pearson*) that a defendant may not be subject to "any" punishment or "disadvantage" from a conviction where the sentence is stayed pursuant to section 654. (*Phelon*, *supra*, 132 Cal.App.4th at pp. 1220-1221, citing *Pearson*, *supra*, 42 Cal.3d at pp. 361-362.)

We believe *Phelon* was wrongfully decided. First, since *Reeves* did not involve a sentence stayed pursuant to section 654 and section 654 is never mentioned in *Reeves*, *Phelon* should never have accepted the parties' stipulation that *Reeves* was dispositive. "[I]t is axiomatic that cases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.) Second, and more importantly, *Phelon* failed to consider whether section 2933.1(a) could be considered an exception to section 654, a suggestion that was clearly set forth in *Pearson* -- "[C]onvictions for which service of sentence was stayed may not be so used unless the Legislature explicitly declares that subsequent penal or administrative action may be based on such stayed convictions. Without such a declaration, it is clear that section 654 prohibits defendant from being disadvantaged in any way as a result of the stayed convictions." (*Pearson*, *supra*, 42 Cal.3d at p. 361.)

Proper resolution of the instant issue is found by analogy to the reasoning of *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*), wherein the Supreme Court concluded that a prior serious or violent felony conviction that had been stayed pursuant to section 654 could nevertheless be used as a strike

within the meaning of the "three strikes" law (§§ 667, subds. (b)-(i), 1170.12). (*Benson*, *supra*, 18 Cal.4th at pp. 26-27.)

In arriving at its conclusions, the *Benson* court reasoned: "Section 1170.12, subdivision (b), part of the Three Strikes law enacted by the electorate, provides in pertinent part: '*Notwithstanding any other provision of law* . . . a prior conviction of a felony shall be defined as: [¶] (1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. . . . *None of the following dispositions shall affect the determination that a prior felony conviction is a prior felony* . . . : [¶] . . . [¶] (B) *The stay of execution of sentence.*' (Italics added; see also § 667, subd. (d) [legislative version].)" (*Benson*, *supra*, 18 Cal.4th at p. 28.)

Applying the well-settled rule of statutory construction that "'[w]hen statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it'" (*Benson*, *supra*, 18 Cal.4th at p. 30), *Benson* concluded that section 1170.12, subdivision (b)'s "notwithstanding" language, coupled with language that a "stay of execution of sentence" shall not affect a conviction's status as a prior felony, rendered section 1170.12, subdivision (d) clear and unambiguous and meant that a prior serious or violent felony conviction for which sentence had been stayed under section 654 was still

available for purposes of the three strikes law. (*Benson*, at p. 36.)

Reasoning similar to that employed in *Benson* is applicable in the present circumstances. Section 2933.1(a) states that its 15 percent limitation applies "[n]otwithstanding any other law" to "any person who is convicted of a felony offense listed in Section 667.5 . . . ," i.e., to any violent felony. Section 2933.1(a) does not provide for its application to be subject to section 654. (Cf., e.g., section 1170.1, subdivision (a), governing consecutive sentencing, which provides that its application is "subject to Section 654.") Like the language at issue in *Benson*, the language of section 2933.1(a) is clear and unambiguous -- its application withstands any other law and applies to "any person who is convicted" of a violent felony.

The wisdom of such a construction is illustrated by the present case. If left to stand, the result of the court's decision would be that defendant, after having been given full section 2933 credit on his six-year sentence, would serve less time than he would have served had he not caused the death of the victim. Specifically, defendant could receive either a 30 or 50 percent reduction against his nonviolent vehicular manslaughter sentence pursuant to sections 2931 or 2933, resulting in a reduction of either 1.8 years (§ 2931) or 3 years (§ 2933) and a resulting imprisonment of either 3 or 4.2 years. Applying section 2933.1(a)'s 15 percent limitation to

defendant's violent alcohol-related sentences yields a reduction of .75 years and therefore an imprisonment term of 4.25 years.

We thus conclude that section 2933.1(a) constitutes an exception to section 654 and therefore applies to defendant's vehicular manslaughter conviction.

DISPOSITION

The superior court's order granting defendant's petition for writ of habeas corpus is vacated, and the superior court is directed to enter an order denying the petition.

RAYE, J.

We concur:

SCOTLAND, P.J.

NICHOLSON, J.

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 2407 J Street, Suite 301, Sacramento, CA 95816.

On February 14, 2008, I served the attached

PETITION FOR REVIEW

by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 14, 2008, at Sacramento, California.

_____

DECLARANT